Petition

81-789

No. _____

FILED

OCT 23 1981

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

RUTH RUSHEN, Director, California Department of Corrections, and GEORGE SUMNER, Warden, California State Prison at San Quentin,

Petitioners,

v.

MANUEL TAYLOR, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether state prison administrative decisions concerning reduction of custody of maximum security inmates, which require predictive and subjective evaluations of risks to personal safety and institutional security, and which meet or exceed the due process requirements of Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), are nevertheless invalid for failure to meet all of the due process requirements of Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976) (three judge court), affirmed 434 U.S. 1052 (1978).

STATEMENT OF THE PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS

The appellants in the Court of Appeals were Ruth Rushen, Director, California Department of Corrections, and George Sumner, Warden, California State Prison at San Quentin.

The appellees in the Court of Appeals were two named San Quentin prisoners, James White, and Ivory Briggs, representing a class certified by the district court as ". . . all prisoners who are confined, or who may in the future be confined, in any of San Quentin State Prison's maximum security, minimum privilege segregated housing units after expiration of their definite term of confinement imposed for a rule violation."

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OCTOBER TERM, 1981

RUTH RUSHEN, Director, California Department of Corrections, and GEORGE SUMNER, Warden, California State Prison at San Quentin,

Petitioners,

v.

MANUEL TAYLOR, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
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for the Ninth Circuit

The petitioners, Ruth Rushen, Director, California Department of Corrections, and George Sumner, Warden, California State Prison at San Quentin, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered July 27, 1981.

OPINIONS BELOW

The unpublished memorandum of the Court of Appeals was filed July 27, 1981 and appears as Appendix A to this petition.

The findings of fact and conclusions of law, and judgment and permanent injunction of the district court were filed September 3, 1980 and appear as Appendix B to this petition.

JURISDICTION

Judgment was entered in the Court of Appeals on July 27, 1981, the file stamp date of the memorandum decision of the court. Jurisdiction of this Court to review a decision of a Court of Appeals by way of writ of certiorari after rendition of judgment is conferred by Title 28, United States Code, section 1254(1). This petition is filed within 90 days after entry of judgment.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process clause of section 1 of the Fourteenth Amendment to the Constitution of the United States: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE DISTRICT COURT

The district court exercised jurisdiction under Title 28, United States Code, section 1343(3) in a civil rights action brought by state prisoners under Title 42, United States Code, section 1983 to redress alleged deprivations by state officials of rights of the prisoners under the Fourteenth Amendment to the Constitution of the United States.

The district court certified the action as a class action in behalf of ". . . all prisoners who are confined,

or who may in the future be confined, in any of San Quentin State Prison's maximum security, minimum privilege segregated housing units after expiration of their definite term of confinement imposed for a rule violation."

The prisoners sought declaratory and injunctive relief on their claim that they had unlawfully been deprived of liberty when they were retained in maximum security housing after expiration of the disciplinary terms for which they were originally assigned to such housing. The prisoners alleged this violated the Fourteenth Amendment because the administrative decision for retention was not attended by all of the features of procedural due process described by the three judge district court in Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal.

1976), affirmed 434 U.S. 1052 (1978).[1/]

The prison officials contended that all of the features of Wright due process were not implicated by these proceedings which emphasized predictive and subjective judgments, and that existing regulations which met or exceeded the minimum procedures prescribed in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), should pass muster under the Fourteenth Amendment.

In August 1980 both sides moved for summary judgment on their respective theories described above. Upon granting the prisoners' motion for summary judgment, and denying the motion of petitioners, the district court filed September 3, 1980 its Findings of Fact

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1. The prisoners did not challenge in this action the adequacy of the disciplinary procedures which attended their initial placement in maximum security housing. Findings of the district court, Appendex B, pages 38, 41.

and Conclusions of Law, and Judgment and Permanent Injunction. These are reproduced as Appendix B of this petition. The district court's findings, conclusions, and judgment are not published.

Petitioners' Notice of Appeal to the United States Court of Appeals was timely filed October 3, 1980.

B. PROCEEDINGS IN THE COURT OF APPEALS

Jurisdiction in the Court of Appeals of petitioners' appeal from the final decision of the district court is conferred by Title 28, United States Code, section 1291.

After the matter was fully briefed, and after oral argument by respective counsel, the Court of Appeals, on July 27, 1981, filed its memorandum of decision affirming the judgment of the district court. Judgment was entered in the Court of Appeals July 27, 1981. The

decision of the Court of Appeals, reproduced as Appendix A to this petition, is not published.

C. STATEMENT OF FACTS

Respondents are state prisoners placed in maximum security housing for disciplinary reasons, and then retained in security housing at San Quentin for administrative reasons after the expiration of a term specified for disciplined conduct.

The criteria for determining whether to retain an inmate in secured housing at San Quentin is whether the inmate's presence in general population will jeopardize his safety, the safety of staff or other inmates, or the security of the institution. 15 California Administrative Code, section 3335(a) [ER 362]; Department of Corrections Classification Manual, sections 3602(a) [ER

336]; 3611(d)(2) [ER 339-340]; 3613 [ER 346-347].[2/]

The nature of these classification proceedings and of the classification decision involved is set forth in the uncontradicted affidavit of Warden Sumner:

> "It is accordingly necessary for the Classification Committee to review individual circumstances as they exist at the expiration of the established term and to focus on and consider circumstances relevant to inmate safety, staff safety, and institutional security. Unlike initial determinations of fact as to whether a particular inmate committed a serious rules of violation, the subsequent

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2. "ER" refers to the Excerpt of Record filed in the Court of Appeals.

determination of whether a lower custody classification for the inmate would adversely affect personal safety or security interests will depend upon numerous circumstances, some of which are factual and many of which are subjective evaluations or predictive evaluations by experienced high-level prison personnel, involving information and circumstances which frequently are confidential and cannot be shared with the inmate and which go far beyond the limited personal circumstances of the particular inmate.

"It is my personal experience, gained from attending numerous classification hearings,

that a classification committee's decision is rather freely discussed with the inmate, with good faith give and take on both sides, with reasonable constraints applied regarding the disclosure of confidential information which has significant bearing on institutional security and personal safety.

"Personal safety and institutional security often preclude disclosure to the inmate of evidence relied on for classification decisions made after expiration of minimum eligible release dates.

"As inmates may freely state and discuss their views at classification hearings, as they may submit and have considered

any written materials they wish, and as confidential information about personal safety and institutional security which is pertinent to the classification decision cannot be disclosed to the inmate, I believe that a right of inmates to demand witnesses at such classification hearings would not present substantial assistance to the committee. Inmates may nevertheless suggest additional sources of information, and on occasion staff witnesses are called by the committee at the suggestion of the inmate to give information or explanations supportive of the inmate." [ER 318-319].

Classification hearings were afforded the prisoners after expiration

of their disciplinary terms to determine under the above criteria whether they should be released to general population or retained in security housing. (Findings by the District Court, Appendix B, pg. 39 (White); pg. 41 (Briggs); pg. 42 (all prisoners).

Classification hearings to determine whether to retain inmates in secured housing units follow the procedures, standards and criteria set forth in the departmental classification manual, sections 301-335, and 3601-3633. (Declaration of Warden Sumner [ER 317].) These regulations require the following procedural rights for inmates:

> (1) Advance written notice to the inmate of the hearing, of the proposed action, and of the reasons for the action [Classification Manual section 305(c); 306(a)] [ER 324, 325].

(2) A hearing with personal appearance by the inmate for the purpose of permitting full participation by the inmate and presentation of the inmate's position or point of view, including use of any documented information in support of the inmate's view [Classification Manual, sections 305(a), 305(b)] [ER 324].

(3) Where the inmate is unable to prepare a defense, or where the matter is complex, the inmate is assisted by his case worker or by an investigating officer [Classification Manual, section 306(c)] [ER 325].

(4) A written decision including the reasons continued

security unit housing is deemed necessary [Classification Manual, sections 305(h), 3612(f)(2)] [ER 325, 346]. A copy of this written decision must be given to the inmate [Classification Manual, sections 305(h); 3612(h)] [ER 325, 346].

Classification is an ongoing process, and such hearings continue to be held regularly for each inmate:

(1) At least every 90 days, secured housing inmates are viewed by their unit classification subcommittee [Classification Manual, section 3615(a)] [ER 348-349]. The inmate appears before the subcommittee [Classification Manual, section 3614(e)] [ER 348], and written decisions delinating reasons for

contining in the unit are required [Classification Manual, section 3614(f)(3)] [ER 348].

(2) At least once each year, and sooner whenever recommended by the unit subcommittee [Classification Manual, section 3615(b)] [ER 349], the institutional classification committee must consider relase of the inmate from the secured housing unit [Classification Manual, section 3615(c)(2)] [ER 350]. These reviews include, as above, hearings and discussions with the inmate of the decision and of the reasons for it [Classification Manual, section 3615(c)(2)] [ER 350]. A decision of the institutional classification committee on review is made in writing and

includes the reasons for decision [Classification Manual, section 3615(d)] (ER 350].

The prisoners did not contend, and the district court did not find that classification hearings do not follow these regulations. The complaint alleged, and the district court found that the classification hearings are constitutionally infirm only because they did not afford all of ". . . the procedural safeguards set forth in Wright v. Enomoto." (Findings of the District Court, Appendix B, pp. 39, 41; Conclusions of Law, Appendix B, pg. 44.)

REASONS FOR GRANTING THE WRIT

Under California prison regulations, custody classification decisions concerning whether to retain a state prison inmate in secured housing units for administrative reasons necessarily

require evaluation of risks which reduced custody would pose to the safety of persons and to institutional security. These classification decisions emphasize subjective and predictive judgments, and are distinguishable from disciplinary or revocation decisions which depend primarily upon a retrospective determination of contestable facts.

Department of Corrections regulations require of such custody classification proceedings numerous features of procedural due process including advance written notice of the hearing, of the proposed action, and of the reasons for the action; a hearing with a personal appearance and full participation by the inmate including presentation of the inmate's position or point of view and the use of any documented information in support of the inmate's view; where the inmate is unable to prepare a defense or

where the matter is complex, the inmate is assisted by his case worker or by an investigating officer; a written decision including the reasons continued security unit housing as deemed necessary is given to the inmate. Also under Corrections regulations, the security classification is considered under the above procedures by the Unit Classification Committee at least every 90 days and by the Institutional Classification Committee at least annually and sooner whenever recommended by the Unit Committee.

These classification procedures meet or exceed the minimum requirements of due process for state administrative custody decisions which are evaluative and predictive in nature as set forth in Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979).

The evaluative and predictive nature of the state admministrative decision was

a determinative factor in Greenholtz, and is established without contradiction in this case, but was never raised or considered in the decision of the District Court in Wright or in this Court's summary affirmance of Wright.

The Wright case by its terms applied only to administrative decisions to increase an inmate's custody from general population to maximum security. In the light of Greenholtz, and the light of the features of procedural due process already afforded inmates, and in the light of the evaluative and predictive nature of the decision, it was error to extend Wright to administrative evaluation of risks to the safety of persons and to institutional security which might be posed by the reduction of the custody of an inmate whose initial disciplinary placement in maximum custody is not challenged.

Appellants ask this Court to determine that the Constitution of the United States does not require more due process than is already provided under state regulations governing classification proceedings, and to reverse the judgments below.

ARGUMENT

I

DEPARTMENTAL REGULATIONS AFFORD DUE PROCESS WHICH MEETS OR EXCEEDS THE MINIMUM REQUIREMENTS FOR CUSTODIAL CLASSIFICATION DECISIONS WHICH ARE PREDICTIVE AND EVALUATIVE IN NATURE.

In Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979), this Court held that less due process is required for administrative consideration of release on parole than is required for revocation of parole. The Court reasoned that less process is due because parole release involved application of very broad or generalized criteria, and

because consideration of parole release is necessarily evaluative and predictive in nature. The Court distinguished parole revocation proceedings because the first step to such proceeedings involves a wholly retrospective factual question, Greenholtz, supra, 442 U.S. at 9, and observed generally that procedures designed to elicit specific facts, such as those required in Morrissey, Gagnon, and Wolff, are not necessarily appropriate to parole determination, Id., 442 U.S. at 14. The Court held that the Constitution does not require more of such decisions than notice, an opportunity to be heard, and a statement of the reasons for an adverse decision. Greenholtz, supra, 442 U.S. at 16.

The numerous due process safeguards afforded by department regulations exceed the applicable minimum requirements of due process set forth in Greenholtz.

II

IT WAS ERROR FOR THE DISTRICT COURT TO APPLY THE WRIGHT CASE TO THE INSTANT CASE, OR TO EXTEND APPLICATION OF ALL OF THE DUE PROCESS SAFEGUARDS SET FORTH IN WRIGHT TO THE CLASSIFICATION PROCEEDINGS AT ISSUE IN THE INSTANT CASE.

The judgment and permanent injunction in this case and the opinion in Wright v. Enomoto, supra, would require three procedural safeguards in addition to the procedures already afforded under departmental regulations: (1) a qualified right of the inmate to call witnesses at his classification hearing; (2) a qualified right of the inmate to the assistance of a counsel substitute at the classification hearing; (3) a requirement that the classification decision include not only a statement of the reasons for decision, but also a statement of the evidence relied on for decisions.

This Court in Greenholtz expressly rejected the requirement of a statement of evidence relied on. Greenholtz, supra, 442 U.S. at 15. Indeed, the Court had earlier recognized in its opinion that evaluative and predictive judgments cannot always be articulated in traditional findings. Id., 442 U.S. at 8. Relying on Greenholtz, the Court of Appeals for the Sixth Circuit has recently held that a statement of the evidence relied on is not required for predictive decisions to transfer inmates to administrative segregation. Bills v. Henderson, 631 F.2d 1287, 1298 (6 Cir. 1980).

The right to call witnesses as set forth in the judgment of the district court (Appendix B, pg. 49), is unnecessary and is overly broad and vague. There are no allegations in the prisoners' complaint that witnesses were requested,

and no allegations of what useful testimony might have been given at the classification proceedings at issue in this action. The right to witnesses set forth in the district court's judgment is qualified only by a good faith written designation by prison officials that a particular witness "will be unduly hazardous to institutional safety or correctional goals." (Appendix B, p. 49). There clearly could be many reasons for disallowing witnesses at such proceedings including irrelevance or immateriality of information the witness might offer, the undue consumption of time, and undue burdens on correctional and administrative staff. It is difficult to envision what information could be given a classification committee by a witness which could not also be given in writing. A specific need for a right to call witnesses is not established by allegations in the

complaint, and is not part of any finding by the district court. The Declaration of Warden Sumner in Opposition to Plaintiffs' Motion for Summary Judgment states:

> "As inmates may freely state and discuss their views at classification hearings, as they may submit and have considered any written materials they wish, and as confidential information about personal safety and institutional security which is pertinent to the classification decision cannot be disclosed to the inmate, I believe that a right of inmates to demand witnesses at such classification hearings would not present substantial assistance to the committee.

> Inmates may nevertheless suggest additional sources of information, and on occasion staff witnesses are called by the committee at the suggestion of the inmate to give information or explanations supportive of the inmate." [ER 318-319].

It bears emphasis here that the classification proceeding does not emphasize a retrospective determination of facts. The proceeding emphasizes subjective and evaluative predictions about personal safety and institutional security. A right of inmates to demand witnesses with respect to these internal prison considerations is even more tenuous than would be an inmate's interest in calling witnesses, such as family, friends, or prospective employers, for parole consideration hearings. The record in this action

simply does not support this aspect of the judgment of the District Court.

The record also does not support the qualified right to representation by a counsel substitute (Judgment of the district court [Appendix B, pg. 48-49]). Departmental regulations already provide for assistance of the inmate's case worker, or of an investigator for the inmate, under circumstances similar to that which would invoke the qualified right to a counsel substitute under the District Court's judgment. The record in this action does not support any finding or conclusion that assistance by a case worker or by an investigator would be inadequate for purposes of the classification decision at issue.

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III

THE DECISIONS BELOW CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND WITH THIS COURT'S DECISION IN GREENHOLTZ.

The United States Court of Appeals for the Sixth Circuit has held that Greenholtz due process, and not Wright due process, applies to administrative transfers into segregation which require essentially predictive judgment. Bills v. Henderson, 631 F.2d 1287, 1294-1295, 1296 (6 Cir. 1980).

The decision in Wright was rendered in 1976, and was summarily affirmed in 1978, before the reasoned written decision of this Court in Greenholtz in 1979. Neither the district court decision in Wright, nor this Court's summary affirmance considered what effect the subjective and predictive nature of the classification decisions should have on due process requirements. But these factors

were crucial and determinative for the majority in Greenholtz.

The Wright decision, by its terms, applied only to classification decisions to increase the custody of state prisoners from general population to maximum security. Despite Greenholtz, and despite Bills v. Henderson, supra, the decisions below significantly extend Wright to administrative reduction of custody of maximum security inmates.

This extending of the application of Wright is not justified by the record in this action, and is contrary to the decision of this Court in Greenholtz, and the decision of the Court of Appeals for the Sixth Circuit in Bills v. Henderson, supra.

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CONCLUSION

For the foregoing reasons petitioners respectfully request that this petition for writ of certiorari be granted.

DATED: October 23, 1981

GEORGE DEUKMEJIAN,
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WILLIAM D. STEIN
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Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Manuel Taylor, et al., Plaintiff-Appellees,	)	No. 80-4494
vs.	)	D.C. No. 80-0139
Ruth Rushen, Director, California Department of Corrections, et al., Defendant-Appellants.	)	MEMORANDUM

Appeal from the United States District Court for the Northern District District of California
Stanley A. Weigel,
District Judge, Presiding
Argued and submitted June 12, 1981

Before: ALARCON, NELSON, and REINHARDT, Circuit Judges,

In this class action by a group of state prisoners, the district court entered summary judgment in favor of plaintiffs and issued a permanent injunction requiring the California Department of Corrections to modify certain classification procedures. We affirm.

The plaintiff class consists of prisoners placed in secured housing for disciplinary reasons for a fixed term who were retained in security housing for administrative reasons after that term had expired. The district court held that such prisoners were entitled to a classification hearing with the due process safeguards mandated in Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976)(three judge court), aff'd 434 U.S. 1052 (1978)(summary affirmance) for transfer of inmates from the general population to secured housing for administrative reasons.

The state argues that the current procedure, which does offer several procedural safeguards, meets the due process requirements for predictive and evaluative custodial classification decisions, citing Greenholtz v. Nebraska Penal

Inmates, 442 U.S. 1 (1979). This argument is not persuasive. Greenholtz involved a distinguishable early parole release procedure while Wright, which was summarily affirmed by the Supreme Court, required these safeguards in an inquiry virtually identical to the one in question here. Accordingly, in our view Wright requires the conclusion that where the state chooses to retain an inmate in secured housing for administrative reasons after a fixed term imposed on disciplinary grounds has expired, the liberty interest associated with the end of that fixed term requires these due process safeguards before additional detention in this more restrictive environment may be imposed. AFFIRMED.

Taylor v. Rushen

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MANUEL TAYLOR, et al.,	)	
	)	
Plaintiffs,	)	NO.
	)	
vs.	)	C-80-1039 SAW
	)	
RUTH RUSHEN, DIRECTOR, California Department of Corrections, et al.,	)	
	)	
Defendants.	)	
	)	

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT

1) James White is a prisoner of the State of California. He is imprisoned in a Management Control Unit (MCU) at San Quentin State Prison.

2) Ivory Briggs is a prisoner of the State of California. He is imprisoned in a Security Housing Unit (SHU) at San Quentin State Prison.

3) The class on behalf of which this suit was brought was certified as a

class by this Court on May 2, 1980. The members of this class are all prisoners who are confined, or who may in the future be confined, in any of San Quentin State Prison's maximum security, minimum privilege segregated housing units after expiration of their definite term of confinement imposed for a rule violation.

4) Defendant Ruth Rushen is the Director of the California Department of Corrections, and as such is responsible for the administration of all California prisons, including San Quentin.

5) Defendant George W. Sumner is the Warden of the California State Prison at San Quentin. He is empowered by statute to administer the prison according to the rules and regulations promulgated by defendant Ruth Rushen as Director of the California Department of Corrections.

6) Title 15, California Administrative Code, §3338(a) mandates

that inmates placed in segregation from the general population be given a hearing.

7) Title 15, California Administrative Code, §§3315(b)(4)(B) and 3330(e) provide that if an inmate is found guilty of a serious rule violation he may be placed in a segregated housing unit for disciplinary detention for a period not to exceed ten days. This term may be increased with the prior approval of the Director. A classification hearing will be held within 10 days if an inmate is retained in segregated housing for any reason upon completion of the disciplinary detention. 15 Cal. Adm. Code § 3338(a)(2).

8) The classification committee then sets a determinate term of confinement with a minimum eligible release date (assuming good behavior) in segregation for the rule violation.

California Department of Corrections Classification Manual §3611. When setting this term the classification committee may consider certain aggravating factors and impose concurrent or consecutive sentences. California Department of Corrections Classification Manual § 3611(g).

9) Plaintiffs have served their determinate terms in segregation for rule violations and are now confined for administrative reasons.

10) On July 6, 1978, while incarcerated at San Quentin, plaintiff White was charged with assault. As a result of this charge, plaintiff White was immediately placed in SHU at San Quentin. A hearing was held pursuant to Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976), Aff'd, 434 U.S. 1052 (1978), where it was determined that plaintiff White

should be retained in segregation pending adjudication of the rule violation.

11) On November 22, 1978, at a prison disciplinary hearing, White was found guilty of assault, was assessed ten days in disciplinary detention, with credit for time served, and referred to the Institutional Classification Committee (ICC) for assignment to appropriate housing.

12) On December 7, 1978, the ICC, acting pursuant to § 3611 of the Department of Corrections Classification Manual, assigned plaintiff White to the SHU for a maximum term of two years with a minimum eligible release date of January 6, 1980.

13) Plaintiff White does not challenge the adequacy of the procedure afforded him in determining whether to

retain him in segregation up to January 6, 1980.

14) White was not released from SHU upon the expiration of his term on January 6, 1980. On January 22, 1980, White received a hearing with personal appearance before the classification committee. Despite the fact that White had "maintained a conforming adjustment in SHU" by not engaging in any kind of misconduct, the committee determined that he should be placed in MCU for an indefinite term for administrative reasons. White did not receive a hearing with the procedural safeguards set forth in Wright v. Enomoto, 462 F.Supp. 397, 404-5 (N.D. Cal. 1976) aff'd, 434 U.S. 1052 (1978). Plaintiff White remains in MCU at San Quentin.

15) On October 10, 1979, while incarcerated in the general prison population at San Quentin, plaintiff Briggs

was charged with conspiracy to set fire to another inmate's cell. Briggs was immediately placed into segregation. On October 23, 1979, a hearing pursuant to Wright v. Enomoto, supra, was held. It was determined that Briggs would remain in segregation pending adjudication of the rule violation.

16) On October 24, 1979, at a prison disciplinary hearing, Briggs was found guilty of assault. A ten day disciplinary detention with credit for time served was assessed against Briggs and he was referred to the ICC for assignment to appropriate housing.

17) On December 19, 1979, the ICC, acting pursuant to §3611 of the Deparment of Corrections Classification Manual, ordered that plaintiff Briggs be retained in the SHU for a term of six months.

18) Plaintiff Briggs does not challenge the adequacy of the procedure afforded him in determining whether to place him in disciplinary confinement.

19) On February 25, 1980, Briggs's disciplinary term in the SHU expired. However, Briggs was not released from SHU on this date. On March 4, 1980, the ICC ordered that Briggs be retained in the SHU indefinitely for administrative reasons despite the fact that he had not engaged in any misconduct since his assignment to the SHU. Briggs did not receive a hearing with the procedural safeguards set forth in Wright v. Enomoto, 462 F.Supp. 397, 404-5 (N.D. Cal., 1976) aff'd 434 U.S. 1052 (1978).

20) It has already been determined in Wright v. Enomoto, supra, 462 F.Supp. at 399 that conditions in maximum security housing units at San Quentin

differ substantially from those in the general prison population at San Quentin.

21) Defendants already provide hearings with procedures required by Wright v. Enomoto, supra, to all prisoners who are transferred from the general population to administrative segregation. See Title 15, California Administrative Code, §§3335-3338. Defendants now provide a classification hearing for all prisoners who are retained in segregated housing after their disciplinary term has expired, unless the prisoner was confined in segregated housing before serving his disciplinary term. See Title 15, California Administrative Code, §3338(a)(2). Thus, defendants will suffer little harm if they are required to provide a hearing consistent with Wright v. Enomoto to plaintiffs, who

have been retained in segregated housing after their determinate term has expired.

CONCLUSIONS OF LAW

1) This Court has jurisdiction of the parties and of the subject matter of this proceeding under 28 U.S.C. §1334(3).

2) "[I]f the state itself imposes limits on its discretion by conditioning decisions such as prison transfers on a specific standard being met, the state creates a liberty interest which is protected by due process. This is true whether the limits which the state imposes on itself stem from statute, rule, or regulation." Wright v. Enomoto, 462 F.Supp. at 402. See Vitek v. Jones, 48 U.S.L.W. 4317 (U.S. March 25, 1980); Meachum v. Fano, 427 U.S. 215, 226 (1976). The State of California has created a liberty interest for plaintiffs by requiring that a prisoner may not be retained in segregated housing after the

expiration of his minimum eligible release term unless the security and safety of the institution necessitate his retention in segregated housing. 15 Cal. Adm. Code §§3335(a), 3315(b)(5)(D) and 3338(e).

3) Although defendants have accorded plaintiffs a hearing, as required by 15 Cal. Adm. Code §3338(a)(2), they have not given plaintiffs a hearing with the procedural safeguards listed in Wright v. Enomoto, 462 F.Supp. at 404-5. As noted in Wright v. Enomoto, the deprivation of liberty "suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge." 462 F.Supp. at 403. Because plaintiffs are not being confined for administrative rather than disciplinary reasons, they each must be accorded a proper hearing on the reasons

for placing then in administrative confinement. These reasons may or may not include plaintiffs' past violations of prison rules, which were the subject of the disciplinary hearings afforded plaintiffs. The hearings on disciplinary confinement did not consider whether plaintiffs should be placed in administrative confinement. Hence, plaintiffs must each be given a hearing with the procedural safeguards mandated in Wright v. Enomoto for prisoners transferred from the general prison population to administrative maximum security confinement.

DATED: September 3, 1980

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Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MANUEL TAYLOR, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	C 80-139 SAW
	)	
RUTH RUSHEN, Director, California Department of Corrections, et al.,	)	
	)	
Defendants.	)	
	)	

JUDGMENT AND PERMANENT INJUNCTION

Based on the Findings of Fact and Conclusions of Law filed herewith the Court finds that plaintiffs are entitled to summary judgment as a matter of law.

IT IS THEREFORE ORDERED that plaintiffs' motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendants, their officers, representatives, agents, servants, employees, attorneys and all persons acting in their aid or in the aid of any of them, are enjoined

and restrained from retaining plaintiffs James White and Ivory Briggs, and/or any member of the class they represent, as certified by order of this Court dated May 2, 1980 (said class consisting of all prisoners who are confined, or who may in the future be confined, in any of San Quentin State Prison's maximum security, minimum privilege, segregated housing units after the expiration (originally set or reduced) of their definite term of confinement imposed for a rule violation) in maximum security housing units at San Quentin State Prison, or any other correctional institution, for "administrative" reasons or purposes, without first providing them with the following procedural safeguards, unless the prisoner is retained for an unexpired term as to which the following safeguards have been provided to that prisoner as to that term:

1. Written notice of the reasons for such retention in sufficient detail to enable them to prepare a response or defense, said notice to be furnished, except in case of genuine emergency, within forty-eight (48) hours after service of a copy of this injunction upon any attorney of record for defendants;

2. A fair hearing before one or more prison officials, such hearing to be held not more than ninety-six (96) hours after such service, unless a plaintiff requests, in writing, additional time in which to prepare a defense;

3. Representation by counsel-substitute if prison officials determine that the inmate is illiterate or that the complexity of the issues makes it unlikely that the inmate can collect or present the evidence necessary for an adequate comprehension of the case;

determination and designation of counsel-substitute to be made at the time of the giving of the aforesaid notice; if counsel-substitute is not provided, the reasons must be stated in said notice as well as in writing at the time of the hearing;

4. A reasonable opportunity to present witnesses and documentary evidence unless prison officials determine in good faith that presentation of evidence they designate in writing will be unduly hazardous to institutional safety or correctional goals;

5. A written decision including references to the evidence relied upon and the reasons for such confinement.

The time provisions in paragraphs 1 and 2 above are hereby stayed for ninety (90) days to allow defendants reasonable time to set up procedures for compliance,

provided that defendants begin promptly to comply with said provisions.

No person shall violate the letter or spirit of this order by any subterfuge or indirection.

Dated: September 3, 1980

_____

Judge

Opposition

Office - Supreme Court, U.S.
FILED
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CLERK

No. 81-789

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

RUTH RUSHEN, Director, California Department of Corrections, and GEORGE SUMNER, Warden, California State Prison at San Quentin,
Petitioners,

vs.

MANUEL TAYLOR, et al.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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STATEMENT OF THE ISSUE

Whether prisoners confined in segregation after the expiration of a fixed disciplinary term imposed for a rule violation are entitled either to release from segregation or to a hearing with the same procedures as those required when prisoners are removed from the general population to segregation for non-disciplinary reasons.

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RUTH RUSHEN, Director, California Department of Corrections, and GEORGE SUMNER, Warden, California State Prison at San Quentin,

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Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Respondents, a class of prisoners at San Quentin State Prison, respectfully pray that a writ of certiorari should not issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS

Respondents, prisoners incarcerated at San Quentin State Prison, were found guilty at a disciplinary hearing (see Wolff v. McDonnell (1974) 418 U.S. 539), of a serious rule violation. As a result of the disciplinary proceedings, respondents were confined in a secured housing unit. In conformance with statewide regulation, the Institutional Classification Committee (ICC) established a "determinate" term of confinement in this unit and an "expected release date" therefrom. See copy of California Department of Corrections Classification Manual §3611(a),(c) attached hereto as an appendix. After serving their specified terms in the secured housing unit, respondents continued to be so confined.

Petitioners admit that retention of respondents in a segregated unit beyond the expected release date is permissible only if the ICC determines that the criteria set forth in 15 Cal. Adm. Code §3335(a) [1] for administrative segregation have been met. Petn. for Cert. p. 7. These criteria are identical to that used to determine whether a general population inmate merits confinement in segregation.

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1. 15 Cal. Adm. Code §3335(a) reads:
"When an inmate's presence within an institution's general inmate population presents an immediate threat to the inmate's own safety, the safety of others, endangers institution security or jeopardizes the integrity of an investigation into alleged serious misconduct or criminal activities, the inmate will be immediately removed from general population and be placed in administrative segregation. Administrative segregation may be accomplished by confinement in a unit designated for that particular purpose or, in an emergency, to any single cell unit capable of providing segregation from the general population and the degree of security and control required of the reason for such placement."

"When a prisoner is transferred from the general population to the grossly more onerous conditions of maximum security... for administrative reasons" (Wright v. Enomoto (N.D. Cal. 462 F. Supp. 397, 402 aff'd (1978) 434 U.S. 1052) he is entitled to a hearing with those procedures mandated by Wolff. Id. at 403. Respondents, who continue to be confined in maximum security housing for administrative, rather than disciplinary, reasons received only a limited hearing. They did not have the benefit of a qualified right to counsel-substitute, the qualified right to call witnesses and a statement of the evidence relied on by the ICC in reaching a decision. The District Court found that providing these procedures will result in little harm to petitioners.

A WRIT OF CERTIORARI SHOULD NOT ISSUE IN THIS CASE

Before addressing the merits of the petition, it is important to clarify what is not at issue. Petitioners do not dispute the existence of a liberty interest; nor do they claim that this interest is different from that possessed by prisoners in the general population. Consequently, petitioners do not challenge the need for a hearing before prisoners are retained in segregation. Lastly, petitioners have not made any factual showing or allegation that an economic or administrative burden will result if respondents are allowed, in certain circumstances, to call witnesses, have counsel-substitute and are given a written statement indicating the evidence relied on by the classification committee.

Petitioners claim only the additional procedures are not constitutionally required because the decisions are subjective and predictive, as opposed to factual determinations. Pet. for Cert. pp. 18-19. As the decisions by classification committees to remove an inmate from the general population are also subjective and predictive (see Bills v. Henderson (6 Cir. 1980) 631 F.2d 1287, 1293), petitioners' argument can only succeed if this Court overrules its recent affirmance of Wright v. Enomoto, supra. As will be shown below, there is no reason to do so.

Wright was a necessary and logical extension of Wolff. In holding that due process applies to prison disciplinary proceedings, Wolff noted the similarity, for purposes of due process analysis, between the deprivation of good-time

and the imposition of "solitary" confinement for serious misconduct. Wolff v. McDonnell, supra at 571 n. 19. To protect against an "arbitrary determination of the factual predicate for imposition of [either] sanction," this Court required that an inmate receive certain p cedural protections. Id; see also Vitek v. Jones (1979) 445 U.S. 480, 488.

Based on an undisputed record which confirmed this Court's conclusion that segregation "represents a major change in the conditions of confinement" (Wolff v. McDonnell, supra at 571, n. 19), and the existence of a regulation limiting the discretion of prison officials, Wright required Wolff procedures when a prisoner is placed in restricted housing for reasons other than specific rule violations. Wright v. Enomoto,

supra. To not do so would have created a glaring inconsistency. Prison officials would then have been free to deprive without due process a general population prisoner of the "residuum of liberty" he retains (see Wright v. Enomoto, supra at 402) simply by not charging the prisoner with a rule violation for his conduct and claiming segregation was necessary to preserve the security of the institution. In other words, whether a hearing is required would depend solely upon whether staff classified the misconduct as disciplinary or administrative.

The Fifth Circuit reached this conclusion while affirming a judgment which ordered the same relief as Wright. "Regardless of what the State chooses to call the confinement to which plaintiff

was subjected, the fact remains that the State, through regulation if not practice, had granted plaintiff a liberty interest in being free from arbitrary transfers from the general population to disciplinary segregation." Parker v. Cook (5th Cir. 1981) 642 F.2d 865, 875. See also Taylor v. Clement (S.D.N.Y. 1977) 433 F.Supp. 585, 587 where the court stated, "We take it to be axiomatic that prison officials cannot avoid their due process responsibilities simply by relabeling the punishments imposed on prisoners within their charge." In Bills v. Henderson, supra, the Sixth Circuit reached the same conclusion and ordered substantially similar relief. See also Ruiz v. Estelle (S.D. Texas 1980) 503 F.Supp. 1265, 1365.

Bills v. Henderson is especially significant because the opinion considers

the effect of Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1 on the continued viability of Wright. Contrary to petitioners' position that Greenholtz requires less procedures if the decision to be made at the hearing is in part predictive or subjective, the court found its holding to be "reinforced" by Greenholtz: "In that case, the Court found that Nebraska's discretionary parole statute created an expectation which entitled potential parolees to some measure of constitutional protection. Greenholtz, supra, 442 U.S. at 12, 99 S.Ct. at 2106. Greenholtz made it clear that protected liberty interests may be created even when the prerequisite which limits the discretion of prison officials is a 'predictive judgment' based on certain guidelines rather than a specific factual finding.

Greenholtz, supra, 442 U.S. at 9-10, 99 S.Ct. at 2104-05. Consequently, the predictive nature of the determination which prison officials are required to make in the instant case does not indicate the absence of a protected liberty interest even though these types of 'predictive judgments' inherently involve a large measure of discretion." Bills v. Henderson, 631 F.2d at 1293.

Justice Powell's opinion in Greenholtz explains why the predictive and subjective nature of the decision is not determinative. "[U]nless the parole board makes parole release determinations in some arbitrary or random fashion, these subjective evaluations about future success on parole also must be based on retrospective factual findings." Greenholtz v. Nebraska Penal Inmates, supra at 20 (Powell, J. concurring and dissenting.) See also Morrissey

v. Brewer (1972) 488 U.S. 471, 480, where the Court applied more than the Wolff protections to the parole revocation decision which "involves the application of expertise in making a prediction as to the ability of the individual to live in society without committing antisocial acts," because each such decision still "depends on facts."

The Court has clearly held that the substantive nature of the decision does not negate the need for due process. In Vitek v. Jones (1979) 445 U.S. 480, the issue concerned the due process rights of state prisoners transferred to a mental hospital for treatment. "The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely '[t]he subtleties and nuances of

psychiatric diagnoses' that justify the requirement of adversary hearings." Id. at 495. Similarly, the subjective assumptions and predictive judgments made by correctional "experts" in classification decisions must be stated for the record and open to challenge if an arbitrary decision is to be avoided.

The qualified right to call witnesses, to counsel-substitute and the right to receive a statement of the evidence relied on are fundamental protections against arbitrary action by prison officials. Without witnesses testifying in his behalf, the prisoner is forced to rely on his own testimony.[2/] Clearly, this testimony alone will not be

2. Although a prisoner is currently allowed to submit documentary evidence, this is of little value when a prisoner is confined to his cell and does not have the assistance of counsel-substitute to conduct a thorough investigation. See Clutchette v. Enomoto (N.D. Cal. 1979) 471 F.Supp. 1113.

sufficient to overcome that of staff. The prejudice resulting from the absence of counsel-substitute to an illiterate inmate or one who is unable to collect or present evidence is obvious. Without counsel-substitute in these situations there is no point in a hearing, as the prisoner is not able to challenge the allegations of staff. If a statement of the evidence relied on is not produced, the reviewing authority cannot determine "whether the decision-maker considered information outside" of the relevant criteria. Coppola v. U.S. Attorney General (D. Ct. 1977) 455 F.Supp. 15, 20; see also Corralluzzo v. New York State Parole Board (2d Cir. 1977) 566 F.2d 375, 379.

In Wolff this Court emphasized the flexible nature of due process and held consideration must be given to the nature

of the government function and the private interest affected. Wolff v. McDonnell, supra at 560. See also Greenholtz v. Nebraska Penal Inmates, supra at 12. In contrast to the importance of these procedures to prisoners, petitioners, as in Wright, "have made no showing that prison administration or safety will be jeopardized if defendants are required to accord plaintiffs at least the minimal protection called for by Wolff in the case of disciplinary sanctions. These minimal protections are essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby to avoid subjection to the severe deprivation of confinement in maximum security. Indeed, defendants' interest in preventing prison violence may be well served by making

fair procedures requisite to maximum security confinement." Wright v. Enomoto, supra at 403.

CONCLUSION

Just as Wright is an extension of Wolff, the instant case is a logical application of Wright. Both the District Court and the Court of Appeal have recognized this principle while summarily rejecting petitioners' arguments which rely exclusively on Greenholtz. There is no reason for this Court to disturb the orderly and necessary development of the law of due process which is essential to a fair and accurate decision-making process in prison.

DATED:

Respectfully submitted,

DONALD SPECTER

Attorney for Respondents

APPENDIX

A.

Sec. 3611. Classification Committee Determinations. The responsibility for determining the need for retention in a security housing unit and the setting of a determinate period of confinement rests with the classification committee of the institution(s) where the inmate is serving or will serve the term(s) of confinement.

(a) Institutions with departmentally designated security housing units may delegate the responsibility for administering the determinate term procedures to a security housing unit subclassification committee, subject to the institution classification committee's review and approval.

. . . .

(c) Establishing a term of confinement or expected release date in a security housing unit will be accomplished at the earliest possible time. This will ordinarily be:

(1) At the time the classification committee meets to consider placing the inmate in the unit;

(2) At the time of the classification committee's review of another authority's temporary action placing an inmate in the unit; or

(3) When situations or circumstances which have prevented the fixing of a determinate term cease to exist or have abated or changed so as to permit the fixing of a term or the inmate's release from the unit.

(4) In the absence of precluding situations or circumstances, the term of confinement wil, be fixed within 30 days of the inmate's placement in the unit.